KHOO THAN SUI v. CHAN CHIAU HEE

[O.C.J. (Seah J.) November 18, 1974]
[Kota Kinabalu — Civil Suit No. 200 of 1971]

Contract — Towing of logs — Failure to deliver logs — Alleged custom relating to lost logs — No satisfactory proof of custom — Defences of act of God and frustration — Bailee for reward — Burden of proof — Damages.

The plaintiff and the defendant had entered into a verbal contract whereby the defendant agreed to tow the plaintiff's logs from Sungei Sugut to his log pond at Sandakan. The defendant towed a total of 82 logs but only 11 logs were delivered. The plaintiff claimed damages for the loss. The defences of the defendant were (a) act of God and (b) frustration. It was alleged that the logs were lost in a storm at sea. It was also alleged that there was a custom in Sandakan whereby the towing contractor would only pay to the log owner $25.00 for every log lost during the journey from Sungei Sugut to Sandakan.

Held: (1) the storm which was encountered was not violent enough to be regarded as an act of God;

(2) in a towing contract of this nature a storm must be expected and would have to be guarded against and therefore the defence of frustration must fail;

(3) the defendant was a bailee for reward and as in this case he had not discharged the burden of proving that the loss occurred without any negligence or default or misconduct of himself or any of his servants, the plaintiff was entitled to claim for the loss of the logs from the defendant;

(4) the alleged custom had not been satisfactorily proved in this case and the plaintiff was entitled to the value of the logs not delivered.

Cases referred to:-

(1) *Chan Cheng Kum & Anor.* v. *Wah Tat Bank Ltd. & Anor.* [1971] 1 M.L.J. 177.

(2) *Kwan Sun Ming* v. *Chak Chee Hing* [1965] 1 M.L.J. 236.

(3) *Davis Contractors Ltd.* v. *Fareham U.D.C.* [1956] A.C. 696.

(4) *Morris* v. *C.W. Martin & Sons Ltd.* [1965] 2 All E.R. 725 at p. 731.

(5) *Muniandy & Ors.* v. *Public Prosecutor* [1966] 1 M.L.J. 257.

CIVIL SUIT.

P. V. Yap for the plaintiff.

J. P. Kitingan for the defendant.

Seah J.: Sometime in January 1971 the plaintiff and the defendant entered into a verbal contract whereby the defendant agreed to tow the plaintiff's logs from Sungei Sugut to his log-pond at Sandakan at the agreed towing charge of twelve cents per cubic foot. In addition the plaintiff has testified that he had also agreed to pay the defendant $2 each for tying the sinker-logs to the floater-logs before towing. The defendant, on the other hand, has alleged that the agreed rate was $5 per sinker-log. To test the veracity of these conflicting testimonies, I like to refer to the evidence of Abdul Mohen bin Manong (DW3), the former "serang" of the defendant. According to this witness, the defendant paid him and the crew $1 per log as towing charge and $2 for tying each sinker to the floaters. I take judicial notice that tying charges in respect of sinker-logs would only be paid by the log-owner to the towing contractor when the sinkers had reached the log-pond safely; that the tying charges could not be claimed if the sinkers were lost on the way to the log-pond. After having given careful consideration to the matter, I prefer the testimony of the plaintiff to that of the defendant and I find as a fact that the agreed rate for tying the sinkers to the floaters before towing was $2 each.

The defendant has alleged that apart from the above terms, there were at least three other terms which had been agreed upon between them, namely (a) that the amount of compensation payable by the defendant to the plaintiff for floaters lost during the tow was $25 each; (b) that there would be no compensation payable by the defendant to the plaintiff for sinkers lost during the tow and lastly (c) that the plaintiff agreed to pay $80 per day for waiting time. To all these allegations the plaintiff has strenuously denied them.

It is common knowledge that the market value of an average size log would be between $100 to 150 each and I find it difficult to believe that the plaintiff would accept an offer of $25 compensation for every floater-log lost during the tow. The defendant has alleged that in 1971 there was a custom in Sandakan whereby the towing contractor would only pay to the log-owner $25 for every log lost during the journey from Sungei Sugut to Sandakan. In support of this claim, the defendant has produced certain documentary evidence which had been marked as Exhibit D1(a) to (d). These documents purport to show that between August 31, 1971 and September 30, 1972 the defendant had been towing logs for Labuk Development Co., Sdn. Bhd., Sandakan from Sungei Sugut to Sandakan and that he was debited the sum of $25 for each floater-log lost during the voyage. The defendant however, has not been able to produce any documentary evidence to support his contention that this custom had existed in January 1971. He has called his younger brother, Chang Chee Yah (DW5) in an attempt to give testimony to establish the custom. All I can say about the evidence of the younger brother is that it is tainted. It seems to me that the younger brother is able to give evidence on some practice or custom where the defendant does not appear to have knowledge of its existence. In the absence of any independent testimony as regards the existence of the custom in 1971 or January 1971 I am unable to accept the evidence of Chang Chee Yah (DW5). In defining a trade custom, Lord Devlin in *Chan Cheng Kum & Anor.* v. *Wah Tat Bank Ltd. & Anor.*[1] said at page 179:

> "Universality, as a requirement of custom, raises not a question of law but a question of fact. There must be proof in the first place that the custom is generally accepted by those who habitually do business in the trade or market concerned. Moreover, the custom must be so generally known that an outsider who makes reasonable inquiries could not fail to be made aware of it. The size of the market or the extent of the trade affected is neither here nor there. It does not matter that the custom alleged in this case applies only to part of the shipping trade within the State of Singapore, so long as the part can be ascertained with certainty, as it can here, as the carriage of goods by sea between Sarawak and Singapore. A good and established custom 'obtains the force of a law, and is, in effect, the common law within that place to which it extends': *Lockwood* v. *Wood* (1844) 6 Q.B. 50 or 115 E.R. 19 *per* Tindal C.J. at page 64. Thus the custom in this case, if proved, takes effect as part of the common law of Singapore.
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> As such it will be applied by any court dealing with any matter which that court treats as governed by the law of Singapore. In this sense it is binding not only in Singapore but on anyone anywhere in the world.
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> The common law of Singapore is in mercantile matters the same as the common law of England, this being enacted in

the Laws of Singapore (1955) Chapter 24 section 5(1). Accordingly, the question whether the alleged custom, if proved in fact as their Lordships hold that it is, is good in law must be determined in accordance with the requirements of the English law. These are that the custom should be certain, reasonable and not repugnant. It would be repugnant if it were inconsistent with any express term in any document it affects, whether that document be regarded as a contract or as a document of title."

Applying this exposition of the law to the facts of this case, I hold that the alleged custom has not been satisfactorily proved. In this connection, I accept the testimony of the plaintiff to that of the defendant and hold that the parties had neither discussed nor agreed about payment of compensation of logs (both floaters and sinkers) which might be lost during the voyage from Sungei Sugut to the plaintiff's log-pond at Sandakan. I also prefer the evidence of the plaintiff to that of the defendant that there was never any discussion about the payment of waiting time at Sungei Sugut. I accept that reasonable waiting time at or near the timber camp is part and parcel of the log towing contract. What is reasonable waiting time is a question of fact to be decided having regard to the particular facts of the case.

I now turn to deal with the main issue of the case.

It is not disputed that when the defendant's boat left Sungei Sugut for Sandakan in February 1971 it was towing a total of eighty-two logs. But when the boat reached Sandakan on the evening of February 10, 1971 there were only eleven logs left and these 11 logs were delivered to the plaintiff's log-pond. A search was made for the remaining logs on February 13, 1971. Near Pulau Puru Puru and found floating in the open sea, thirty-three logs were discovered. On the shore of the pulau, another ten logs were found partly buried in the sand. The defendant says that it would not be economical to try to free these logs from the sand and they were subsequently abandoned by him. However, the 33 logs were towed back to Sandakan. Two of these logs were lost on the way and only thirty-one logs were handed to the log-pond of the plaintiff. In short, forty-two out of a total of eighty-two logs were delivered to the plaintiff and the plaintiff is claiming damages for the missing forty logs and expenses incurred in searching for them from the defendant.

Briefly, the defence of the defendant is (a) Act of God and/or (b) frustration of the contract. I will consider the defence based on Act of God.

Now what are the facts?

I find that the defendant's boat left Sungei Sugut with a raft of eighty-two logs on February 7, 1971 and proceeded to Sungei Sisit where the raft was tied to the bakau trees along the bank of the river. The boat were piloted by Abdul Mohen bin Manong (DW3) the "serang". Abdul Mohen has admitted that he was not a licensed "serang". At Sungei Sisit, the boat went out to the open sea to ascertain the condition of the weather at close quarters. The sea was stormy and it was agreed that the raft could not be towed to Sandakan safely under such condition. The boat then returned to Sungei Sisit and moored alongside the raft. On the morning of February 9, 1971 the boat again went out to the open sea to check the condition of the weather. The "serang" found that the storm had subsided and that it was quite safe to tow the raft to Sandakan. He then decided to leave Sungei Sisit during the high tide as there was a sandbar just outside Sungei Sisit. At about 3 o'clock in the afternoon the boat left Sungei Sisit and headed for the open sea with a raft consisting of 82 logs. Two hours later, the "serang" says that the weather suddenly changed for the worse. The sky became gloomy, the wind was strong and the waves increased in ferocity. This happened at about 5 p.m. The "serang" says that in view of the presence of the sandbar it was too dangerous to turn back. Notwithstanding the impending storm the "serang" decided to continue with its journey to Sandakan. About twenty minutes after 5 p.m., the "serang" says that the storm hit the boat and the raft. The logs began to toss about and knocked against each other. Within a space of one hour the "serang" says that the spikes which were nailed into the logs started to break loose and some were eventually dislodged. When this happened the logs would drift away. The "serang" also says that the rings and chains connected to the spikes were under tremendous pressure and some of them gave way resulting in the logs drifting away from the raft. Because of the stormy weather the "serang" says that part of the main chain snapped and a large number of logs drifted away en bloc. According to the "serang" the storm lasted for about ten hours, *viz.* from 5 p.m. on the afternoon of February 9, 1971 until 4 a.m. on February 10, 1971. There was nowhere to take shelter from the storm and the boat eventually arrived at Sandakan on the evening of February 10, 1971 with only eleven logs in tow.

When asked by his own counsel to describe the storm which he had encountered on the afternoon of February 9, 1971 the "serang" replied that he had met such storm many times before when he was a fisherman.

In *Kwan Sun Ming* v. *Chak Chee Hing*[2] the Federal Court held that "for a storm at sea to be regarded as an act of God it would have to be a storm that could not have been reasonably foreseen in the circumstances." "It is obvious that in a towage contract of this nature a storm must be expected and would have to be guarded against, especially in the open sea. The appellant would therefore be bound as part of his contract to take all precautions necessary against storms that might reasonably be foreseen." It seems to me in order to succeed the defendant must establish by satisfactory evidence that the storm must be violent enough to be regarded as an act of God.

Here there was no evidence that the boat was shipping water. Nor was there any evidence that the crew had to pump out water from the boat. There was no evidence of slowing down or change of speed; instead the evidence appears to suggest that the boat continued with its voyage to Sandakan without any reduction of speed. Moreover, no meteorological report has been tendered to show or tending to show that on the afternoon of February 9, 1971 there was violent storm just outside Sungei Sisit.

It was argued by counsel for the defendant that the fact that the main chain was broken would tend to support the case that the storm was a violent one. I am unable to draw such an inference on the facts adduced before the court. There is evidence that the logs

would behave in similar fashion when meeting a storm, and there is not a shred of evidence to support the inference that the main chain which tows the raft would only snap in a violent storm and not in ordinary storm at sea.

On the evidence of Abdul Mohen bin Manong (DW3) and Abdul Halib bin Maing (DW4) I find that the storm which they had encountered on the 9th and 10th February, 1971 was not violent enough to be regarded as an act of God. This defence therefore fails.

I will consider the defence of frustration.

In view of the decision of the House of Lords in *Davis Contractors Ltd.* v. *Fareham U.D.C.*[3] the proper test for frustration may be formulated as follows: If the literal words of the contract were to be enforced in the changed circumstances, would this involve a fundamental or radical change from the obligation originally undertaken? In this case Lord Radcliffe said at page 729:

"... frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni.* It was not this that I promised to do.... There must be ... such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

Lord Reid put the test of frustration in a similar way at page 721:

"The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end."

Later in his speech, his Lordship approved the words of Asquith L.J. that the question is whether the events alleged to frustrate the contract were "fundamental enough to transmute the job the contractor had undertaken, into a job of a different kind, which the contract did not contemplate and to which it could not apply." Lord Somervell agreed with the conclusion of Lord Reid on "what is the proper basis of 'frustration'" and it is submitted that the test put forward by Lord Reid is substantially the same as that of Lord Radcliffe. Hence it is submitted that there was a majority of three in the House of Lords in the *Davis Contractors'* case in favour of the formulation of the legal standard of frustration in the above terms (see *Chitty* on Contracts (23rd edition) Volume 1 paragraph 1265).

Applying the test to the facts of this case and relying on the dictum of Wylie C.J. in *Kwan Sun Ming* v. *Chak Chee Hing, supra* at page 237, *viz.:*

"It is obvious that in a towage contract of this nature a storm must be expected and would have to be guarded against, especially in the open sea. The appellant would therefore be bound as part of his contract to take all precautions necessary against storms that might reasonably be foreseen."

I am constrained to hold that the defence of frustration also fails.

I will now deal with the law of bailment for reward.

According to *Halsbury's* Laws of England (3rd edition) Volume 2 paragraph 225 reads:

"A custodian for reward is bound to use due care and diligence in keeping and preserving the article entrusted to him on behalf of the bailor. The standard of care and diligence imposed on him is higher than that required of a gratuitous depositary and must be that care and diligence which a careful and vigilant man would exercise in the custody of his own chattels of a similar description and character in similar circumstances.

He is therefore bound to take reasonable care to see that the place in which the chattel is kept including the tackle used in connection with it, is fit and proper for the purpose, to see that the chattel is in proper custody, to protect it against unexpected danger should that arise ... and if it is injured through his negligence, he will not be excused on the ground that it has been subsequently destroyed by inevitable mischance. The custodian may limit or relieve himself from his common law liability by special conditions in the contract; but they will be strictly construed and will be held not to exempt the bailee from responsibility for losses due to his negligence unless the words used are clear and adequate for the purpose or there is no other liability to which they can apply. Further, the custodian must show that the bailor knew of and assented to the conditions; the mere fact that they are his usual terms will be sufficient.... The obligation to take due care exists independently of contract and an action based on breach of the obligation is an action founded on tort.

The bailee is not, apart from special contract, an insurer, and, therefore, in the absence of negligence on his part he is not liable for the loss or damage to the chattel due to some accident, fire, the acts of third parties, or the unauthorised acts of his servant acting outside the scope of their employment."

As regards the onus of proof, paragraph 227 reads:

"When a chattel entrusted to a custodian is lost, injured, or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would exercise in relation to his own property. If he succeeds in showing this, he is not bound to show how or when the loss or damage occurred. If a custodian declines either to produce the chattel entrusted to him when required to do so by the owner, or to explain how it has disappeared, the refusal amounts *prima facie* to evidence of breach of duty on his part and throws on him the onus of showing that he exercised due care in the custody of the chattel and in the selection of the servants employed by him in the warehousing."

If the goods are lost or damaged, whilst they are in his possession, the bailee is liable unless he can show — and the burden is on him to show — that the loss or damages occurred without any negligence or default or misconduct of himself or of any of the servants to whom he had delegated his duty (see *Morris* v. *C.W. Martin & Sons*[4]). The question is whether the defendant has discharged this onus?

The facts disclose that the defendant was not piloting the boat at the material time. It was in fact piloted by Abdul Mohen bin Manong (DW3) the "serang". It has been admitted by Abdul Mohen (DW3) that he was not a licensed "serang" and in my opinion, the defendant had not exercised reasonable care in the choice of his "serang". As a matter of fact, the defendant should not have appointed Abdul Mohen to be a "serang" at all especially when he had to pilot the boat across the open sea on his way from Sungei Sugut to Sandakan.

Secondly, when the "serang" went out to the open sea to check the condition of the weather on the morning of February 9, 1971 he did not go out again before sailing at 3 p.m. the same afternoon. It has been submitted by counsel for the plaintiff that the "serang" should have made another trip to the open sea to ascertain the weather before departing Sungei Sisit and in failing to do this, it is argued that the "serang" had not exercised all diligence. With this submission, I respectfully agree. *A fortiori* when the "serang" has admitted in court that the months of December, January and February are wet months and the weather changes quite frequently.

Lastly it seems to me that when the boat encountered the storm at sea between 5 p.m. and 5.20 p.m., there was no evidence that the boat did make any attempt to reduce its speed. Instead it seems to me that the boat ploughed through the storm on its way to Sandakan reaching its destination on the evening of February 10, 1971. It is little wonder that this resulted in the dislodging of some seventy-one logs from the raft of 82 logs.

On these findings it is quite plain that the "serang" had not taken reasonable care in the discharge of his duty. On the testimonies of the "serang" and his engine-driver, Abdul Halib (DW4) I am not satisfied that the defendant has discharged the burden of proof which rests upon him. On the evidence produced before me, I am satisfied that the plaintiff is entitled to claim the loss of forty logs from the defendant.

I have considered Exhibit P1, P2, P4, P5, P6 and P7 produced by the plaintiff and I am satisfied that the missing forty logs had a total measurements of 5,428.6 cubic feet made up as follows:

(1) Class B logs	2,239.6 cu.ft. @ 53 cts. (royalty)	...	$1,186.99
(2) Class C logs	2,434.7 cu.ft. @ 33 cts. (royalty)	...	804.44
(3) Class A logs	149.6 cu.ft. @ 17 cts. (royalty)	...	25.43
(4) OT logs	604.7 cu.ft. @ 12 cts. (royalty)	...	72.56
	5,428.6 cu.ft.		$2,089.42

According to the plaintiff the cost of extraction together with towing charge work out to $1.06 per cubic foot and particulars of which are as follows:

(a) Felling and bark stripping & cross-cutting	...	10 cts. per cu.ft.
(b) Hauling to pangkalan	...	35 cts. per cu.ft.
(c) Towing down river	...	10 cts. per cu.ft.
(d) Rafting	...	3 cts. per cu.ft.
(e) Towing to log-pond at Sandakan	...	12 cts. per cu.ft.
(f) Sundry (2 workers in timber camp)	...	10 cts. per cu.ft.
		80 cts. per cu.ft.
(g) Add Tender price	...	26 cts. per cu.ft.
		$1.06 cts. per cu.ft.

In the absence of any evidence to the contrary, I am quite prepared to accept the cost of extraction etc., furnished by the plaintiff. However, since towing charges are only payable when the logs have arrived at the log-pond at Sandakan safely, the sum of twelve cents should be deducted. The net extraction cost would therefore be ninety-four cents per cubic foot. Multiply this with the total 5,428.6 cubic feet the total cost of extraction would be $5,102.88. Add the $2,089.42 being royalty paid by the plaintiff the grand total would be $7,192.30. The plaintiff is therefore entitled to the sum of $7,192.30 for the loss of the forty logs.

In addition to claiming for the loss of the forty logs the plaintiff is also claiming from the defendant the sum of $1,020.00 being expenses incurred for the hire of labour, boat and aeroplane to assist in the search of the missing logs. Counsel for the plaintiff has submitted that this claim comes under a duty to mitigate the damage. It follows from the rule that damages are compensatory only and that one who has suffered loss from a breach of contract must take any reasonable steps that are available to him to mitigate the extent of the damage caused by the breach. It is a question of fact in each case whether he has acted as a reasonable man might have been expected to act, and he is not required to risk his commercial reputation or to embark upon complicated litigation in order to mitigate his loss. The plaintiff has produced four bills in support of his claim see (Exhibit P3(a) to (d). I will deal with them in detail. Since Exhibit P3(a) and Exhibit P3(d) are dated 15.2.71 they will be considered together. It seems to me that the plaintiff had hired a boat to search for the remaining missing forty logs in the open sea on February 15, 1971 for three days at the rate of $120 per day, after the defendant had towed back a raft of drifting logs on February 13, 1971. Since the defendant and his crew had spent less than a day in search of the drifting logs on February 13, 1971 near Pulau Puru Puru, I am satisfied that this was a reasonable step to take in the circumstances. However, it seems to me that the boat hire of $120 daily was on the high side. I think $80 per day would be a fair sum. I would substitute the sum of $240 for the amount of $360 (Exhibit P3(d). I would allow the claim of $45 as food allowance in full. I am satisfied that the plaintiff had chartered an aeroplane to look for the missing logs on February 12, 1971 and had in fact incurred the sum of $225. Since the aeroplane is commonly used to search for drifting logs in the open sea as well as to look up timber areas in the forest in Sabah, I do not consider this expenditure to be an unreasonable one. I would also allow this item (Exhibit P3(c). As regards Exhibit P3(b) it seems to me that this amount was incurred on or about February 8, 1971 for boat hire to Sungei Sugut. Since the loss of the logs was only reported or came to the knowledge of the plaintiff on the morning of February 11, 1971 no explanation was given by the plaintiff how this item came to be spent. It seems to me that this particular expenditure had no bearing in the search for the missing or drifting logs. I do not allow this claim. Under this head I would allow the sum of $510 only instead of the amount of $1,020.

Since the defendant had delivered altogether forty-two logs to the plaintiff's log-pond at Sandakan, he was clearly entitled to his towing charges. According to Exhibit P6(1-4) the total measurement in respect of these 42 logs was 4,303.2 cu. feet. The towing charges would therefore be $516.38. I am satisfied on the evidence of Item bin Raja Ali (PW3) that there were only two sinker-logs among the forty-two logs. I would therefore allow a further sum of $4 as tying charges.

After deducting $520.38 I find due to the defendant, I would give judgment in favour of the plaintiff in the sum of $7,181.92 with interest at the rate of 6 per centum per annum from date hereof until final payment. I would also award to the plaintiff his costs of this action to be taxed.

In case I am wrong in my conclusion regarding payment of waiting time and since a lot of the court's time was spent in trying to establish this matter, I would like to deal with it before departing from this case.

I have given careful consideration to the testimonies of Chung Shing Fatt (PW2) and that of Abdul Mohen (DW3) and Abdul Halib (DW4). I prefer the evidence of Chung to that of the defendant's witnesses.

In Federal Court case of *Muniandy & Ors.* v. *Public Prosecutor*[5] H. T. Ong F.J. (as he then was) said that the fact of being unshaken in cross-examination was not *per se* an all-sufficient acid test of credibility; the inherent probability or improbability of a fact in issue must be the prime consideration.

In the year 1971 I take judicial notice that the Chinese New Year fell on the 27th and 28th January, 1971. It is common knowledge that during the Chinese New Year all timber camps in Sabah would be closed down to enable the Chinese workers to return homes to celebrate the festival with the families. It follows that during the Chinese New Year there would probably be insufficient logs to be towed away. Knowing this fact, I find it difficult to believe that the "serang" and his crew would remain at Sungei Sugut from January 17, 1971 until February 7, 1971. I accept Chung's testimony when he testified that after he had returned from the timber camp he found the defendant's boat no longer at the anchorage. Chung assumed and rightly assumed that the boat must have returned to Sandakan because sometime in January 1971 he met the "serang" who informed him that the boat would go to Sungei Sûgut to tow the logs after the Chinese New Year. There was another good reason why the boat had to return to Sandakan. Because it is customary on Chinese New Year's day to give "ang pow" or gift to the workers to show appreciation for work done. Every worker, both native and non-native, looks forward to this with hope and premeditation. The "serang" and his crew are no exception. For these reasons, I hold that the defendant's boat did not wait at Sungei Sugut from January 17, 1971 until February 7, 1971. On the evidence, I am satisfied that the boat sailed for Sungei Sugut on January, 17, 1971 but returned to Sandakan after waiting for a few days. It returned to Sungei Sugut again after the Chinese New Year, when I am unable to decide, on the meagre evidence adduced before me.

Judgment for the plaintiff.

SUCHA SINGH v. SUET CHOW HOUSING DEVELOPMENT SDN. BHD.

[O.C.J. (Mohamed Azmi J.) March 17, 1975]
[Kuala Lumpur — Civil Suit No. 720 of 1974]

Practice and Procedure — Compromise — Enforcement — R.S.C., 1957, O.32 r.6.

As a result of negotiation, the plaintiffs agreed to discontinue the proceedings in this action and the defendants agreed to pay him $6,000. Subsequently the defendants refused to pay the sum of $6,000 and imposed a condition precedent. The plaintiff applied to enter final judgment under O.32 r.6 of the Rules of the Supreme Court.

Held: as the defendants did not have any defence and there was no serious question of law involved, this was a suitable case to be dealt with under O.32 r.6.

MOTION.

Jagjit Singh for the plaintiff.

K. C. Chai for the defendants.

Mohamed Azmi J.: This was an application by Notice of Motion for an order that the plaintiff be at liberty to enter judgment for the sum of $6,000 against the defendants under Order 32 Rule 6 of the Rules of the Supreme Court, 1957.

The plaintiff was the tenant of the defendants of premises known as Nos. 3261, 3262 and 3263, Jalan Genting Kelang, Setapak, Kuala Lumpur, which he had sublet to three tenants. The defendants being desirous of developing the property took steps to obtain vacant possession of the premises, and one of the steps taken was to cause water supply to the said premises to be disconnected. By specially indorsed writ, the plaintiff sued the defendants for damages and for an order that they do restore the water supply. It was pleaded, *inter alia*, that the defendants had unlawfully terminated the tenancy by letter dated April 25, 1973. On June 24, 1974, the plaintiff obtained an interlocutory order of mandamus by Summons-in-Chambers whereby the defendants were ordered to restore the water supply to the three permises and also for interim injunction restraining the defendants from disconnecting the water supply. In the meantime, although the defendants had entered appearance, no Statement of Defence was filed as both parties had entered into negotiation with a view to settlement out of court. As a result of this negotiation, it was not in dispute from the affidavits filed in the present application that they finally agreed that the defendants would pay the plaintiff a sum of $6,000 in full settlement of the civil suit and that the plaintiff would file an application to discontinue the order of mandamus and injunction obtained on June 24. It should be noted that this offer and acceptance were not made without prejudice. The terms of settlement were embodied in a letter dated July 9, 1974 (Exhibit "SS1"). The defendants, however, failed to pay the agreed sum of $6,000 in spite of repeated reminders vide letters dated July 25 ("SS2") and August 8 ("SS3"). On the contrary, on August 12, the defendants' solicitors wrote to the plaintiff's solicitors in the following terms:

"We refer to your letter dated 25.7.74.

Our client have deposited with us the sum of $6,000 and we are instructed not to release the same to you unless your client have completely vacated the premises before 20/8/74.

We have been further instructed that our client's offer is only valid until 20/8/74 and thereafter our client are at liberty to take whatever action they deem fit."

From the affidavit of Choi Mee Chen sworn on March 14, 1975, it was clear that the defendants' defence was based on the above letter. It was their contention that since the plaintiff had failed and neglected to vacate the three premises on or before August 20, 1974, their offer of $6,000 was revoked through lapse of time, and that thereafter the plaintiff's right under the said letter was extinguished.

The principal issue to be decided in this case was whether the plaintiff's right was based on the terms of settlement as contained in the letter dated July 9 (Exhibit "SS1") or on the letter dated August 12 ("SS4"). In my judgment, the plaintiff's right was